No. 03-3631

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GARDEN HOMES MANAGEMENT CORP.; JOSEPH WILF; WESTBOUND HOMES, INC.; REDSTONE GARDEN APARTMENTS, INC.; CATHY ROSENSTEIN,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CORRECTED BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF RELATED CASES

There are no related cases in this Court.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES: **PAGE:**

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1345 and 42 U.S.C. 3614(a). On July 28, 2003, the court entered the Contempt Order under appeal, and defendants noted a timely appeal on August 29, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it imposed a monetary sanction against defendants after finding defendants in violation of both the

Consent Order resolving the underlying case and an order finding defendants in contempt of the Consent Order.

STATEMENT OF THE CASE

On June 21, 1999, the United States filed a complaint alleging that defendants Garden Homes Management Corp., Joseph Wilf, Westbound Homes, Inc., Redstone Garden Apartments, Inc., and Cathy Rosenstein engaged in a pattern or practice of discrimination because of race or color in violation of the Fair Housing Act, 42 U.S.C. 3601-3619 (SA02, Doc. 1).[1] On July 10, 2000, the United States filed an amended complaint, adding a second claim for relief alleging that defendants also engaged in a pattern or practice of discrimination because of familial status (SA04, Doc. 20; SA11-21; DA27).

The case was settled through a Consent Order, which was entered by the district court on September 25, 2001 (DA27-59). The Consent Order required defendants to take a number of affirmative steps to ensure future compliance with the Fair Housing Act.

Because defendants failed to fulfill the Consent Order's requirements in a timely manner, on February 14, 2002, the United States filed a motion to hold defendants in contempt, to order defendants to comply with the Order, and to

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[1] "SA" followed by a number refers to a page in the United States' Supplemental Appendix; "DA" followed by a number refers to a page in Defendants' Appendix; "Br." followed by a number refers to a page in Brief on Behalf of Defendants-Appellants filed with this Court. "Doc." followed by a number refers to an entry in the district court docket sheet.

impose sanctions on defendants for their failure to comply with the Order (SA22-24). On March 11, 2002, the court conducted a hearing on the contempt motion. During the hearing, defendants' counsel conceded that defendants had not complied with the Consent Order in a timely manner. As a result, the court ordered, and the defendants agreed to engage, the Fair Housing Council of Northern New Jersey to conduct the fair housing compliance testing required by Consent Order within twenty days of the hearing (DA41, 42; SA47, 53).

On March 28, 2002, the court entered a written Contempt Order reflecting its rulings of the March 11 hearing. The Contempt Order required defendants, *inter alia*, to retain the Fair Housing Council of Northern New Jersey to conduct fair housing compliance testing by April 1, 2002 (DA63). It also ordered that "[a]ny Defendant that is not in full compliance with the September 25, 2001 Consent Order or the provisions of this Order, shall be fined $1,000 per day for each day that the Defendant remains in violation of either the September 25, 2001 Consent Order or this Order" (DA63-64). Defendants did not appeal this Contempt Order.

On August 28, 2002, nearly five months after the date by which the court ordered them to have retained the Fair Housing Council, defendants filed a motion to amend the Contempt Order to permit them to engage another unidentified group to conduct the compliance testing (DA65-66). The United States filed a response to defendants' motion that it combined with a cross-motion to hold defendants in contempt and for sanctions for failing to enter into a contract with the Fair Housing Council (SA60-62). On July 28, 2003, the court entered its order denying

defendants' motion to amend and granting the United States' cross-motion for contempt and sanctions (DA3-19). The court found defendants in contempt of the Consent Order and its first Contempt Order and imposed the fine of $1,000 per day established by the first Contempt Order for the period between April 3, 2002, the date it found defendants could have entered into the contract for compliance testing, and October 27, 2002, sixty days after defendants filed their motion to amend (DA19).[2] On August 29, 2003, defendants noted their appeal from this order (DA1-2).

STATEMENT OF FACTS

Defendants appeal certain aspects of the second order entered by the district court holding them in contempt for failing to comply with the Consent Order, which settled the case alleging that they engaged in a pattern or practice of discrimination in violation of the Fair Housing Act, and for failing to comply with the court's first Contempt Order, which required defendants to comply with the Consent Order.

A. *Facts*

1. *The Complaint*

Defendants own or manage approximately 30 apartment complexes in which they offer dwellings for rent. In its complaint, the United States alleged that at three of their apartment complexes, defendants refused to rent, refused to negotiate

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[2] The court determined not to extend the sanctions beyond October 27, 2002, because of its delay in deciding the motion (DA18).

for the rental of, or otherwise made unavailable or denied dwellings to persons because of race or color, in violation of 42 U.S.C. 3604(a); and represented to persons because of race or color that dwellings are not available for rental when such dwellings are in fact so available, in violation of 42 U.S.C. 3604(d) (SA17). The United States based these allegations on the results of a series of fair housing tests[3] conducted by the United States and the Fair Housing Council of Northern New Jersey. The tests, conducted at three of defendants' complexes, paired white with African-American testers. Each pair of testers visited the apartment complex and sought information about two-bedroom apartments for the same time period (SA13-16). Comparison of their treatment revealed, among other things, evidence that defendants: (1) falsely told African-Americans who visited the subject properties that apartments were not available to be rented while they told white persons who visited the subject properties that apartments were available to be rented; (2) falsely denied the availability of apartments to African-Americans while they offered white persons available apartments; (3) failed to provide to African-Americans information about apartment availabilities that is as full and complete as the information they provided to white persons; and (4) discouraged African-

[3] A fair housing test involves "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982).

Americans from renting apartments at the subject properties while they encouraged white persons to rent apartments at the subject properties (SA13).

Relying on information learned in the tests as well as evidence gathered after filing suit, the United States subsequently added a second claim for relief in an amended complaint alleging that defendants also engaged in a pattern or practice of discrimination because of familial status[4] by: (1) limiting families with children to only first floor apartments while permitting persons with no children to rent any vacant units in the complex; (2) representing to persons inquiring about apartments that families with children were not permitted to occupy apartments above the first floor; (3) discouraging persons with children from renting at the subject properties, while encouraging persons without children to rent; and (4) failing to provide the same information about apartment availabilities to persons with children as provided to persons without children (SA17-18). The United States alleged that defendants refused to rent, negotiate for the rental of, or otherwise made unavailable or denied dwellings to persons because of familial status, in violation of 42 U.S.C. 3604(a); discriminated in the terms and conditions, or privileges of the rental of a dwelling that indicated a preference or discrimination because of familial status, in violation of 42 U.S.C. 3604(b); made statements with respect to

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[4] "'Familial status' means one or more individuals (who have not attained the age of 18 years) being domiciled with – (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person." 42 U.S.C. 3602(k).

the rental of a dwelling that indicated a preference or discrimination based on familial status, in violation of 42 U.S.C. 3604(c); and represented to persons because of their familial status that dwellings are not available for rental when such dwellings are in fact so available, in violation of 42 U.S.C. 3604(d) (SA18).

2. *The Consent Order*

After extensive settlement discussions, the parties resolved their differences through a Consent Order signed by the parties and entered by the district court on September 25, 2001 (DA27-59). The Order, which the parties contemplated would remain in effect for three years (DA30), imposed an injunction requiring defendants to comply with the Fair Housing Act (DA30-32). In addition, the Order imposed a number of affirmative obligations on defendants, including requirements to provide notice of defendants' nondiscriminatory policies to the public (DA32-33), establish procedures to ensure nondiscriminatory treatment of persons who inquire about renting (DA33-35), educate and train their employees with responsibility for showing, renting, or managing dwellings in the duties and obligations under the Order and the Fair Housing Act (DA35-36), take steps to attract African-American and other minority residents (DA36-37), keep designated records of their rental operations (DA37-41), and enter into a contract with an organization approved by the United States with experience in fair housing testing to conduct fair housing compliance testing at defendants' apartment complexes (DA41-42). The Order also required defendants to compensate victims of their past discriminatory practices (DA42-45) and pay a civil penalty to the United

States (DA45-46). The court retained jurisdiction over the case for the purpose of ensuring defendants' compliance with the Order (DA46-47), and the United States could move to extend the three-year term of the Order if defendants were found to have violated the Order or if the interests of justice otherwise required such an extension (DA46-47). The Order set forth a time by which defendants were required to perform each affirmative obligation imposed by the Order.[5]

3. *The United States' First Motion For Contempt*

Numerous attempts by the United States to secure defendants' compliance with the requirements of the Consent Order were unsuccessful; therefore, on February 14, 2002, the United States filed a motion seeking to have defendants held in contempt and asked the Court to modify the Consent Order (SA22-24). As set forth in the memorandum in support of the United States' motion for contempt, defendants: (1) did not pay the civil penalty due on October 25, 2001, as required by Section XI of the Order (DA45-46) until November 9, 2001; (2) did not establish the fund for victims due on October 10, 2001, as required by Section X (DA42-45) until January 15, 2002; and (3) did not timely complete any of the other non-monetary tasks required of the Order or timely comply with the reporting requirements set forth in the Order (SA26-27). In particular, when the United

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[5] Defendants incorrectly assert that they "were afforded 180 days to address and proceed with the terms and conditions of the Consent Order" (Br. 7). The Order provided different periods to implement different obligations, from as short as ten days (DA34, 42) to as long as 180 days (DA41).

States filed its contempt motion, defendants had not designated the entity to conduct the fair housing training that Section V of the Order (DA35-36) required be completed by December 24, 2001, nearly two months earlier.

Section VIII of the Order required defendants to "enter into a contract with a company or organization with experience in discrimination testing (to be approved by the United States), to develop and implement a program to test for racial and familial status discrimination at each of [defendants'] Apartment Complexes" (DA41-42) within 180 days of the date of entry of the Order. Although 180 days had not yet passed at the time the United States filed its motion, because of defendants' failure to comply with the other requirements of the Order, the United States asked the court to modify the Consent Order to require Defendants to retain the Fair Housing Council of Northern New Jersey as the entity to conduct the testing and to require that the testing begin as soon as possible (SA29-30).

At the outset of the hearing on the contempt motion, defendants conceded that they had not complied with any of its requirements in a timely manner.[6] Defendants then sought to delay the contempt hearing by offering to bring defendants into compliance with the Order as written within 20 days of that date, at

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[6] THE COURT: [N]othing was done by the defendants within the timeframe that the [consent] order contemplated. Do you disagree with that, Mr. Till [defendants' counsel]?
MR. TILL: I don't disagree with that.

SA34.

which time the court could call the parties back for a contempt hearing if it chose to do so (SA35-37). Counsel for the United States expressed reservations about delaying the contempt hearing because of defendants' record of non-compliance and the fact that there were issues on which the parties disagreed regarding what actions would constitute compliance (SA37-39). The court rejected defendants' proposal to delay the contempt proceedings (SA42).

A major point of disagreement between the parties concerned who would conduct the fair housing training and the compliance testing. As noted above, the Order required defendants to provide fair housing training by an entity approved by the United States to employees at the Apartment Complexes within 90 days of the entry of the Order, or December 24, 2001 (DA35-36). Despite several requests to do so, prior to the March 11 hearing, defendants had not provided the United States with the name of *any* organizations it proposed to conduct the training (SA31-32, 45). Given defendants' failure to comply with the Order or to identify any entity to conduct the training, the United States asked the court to require defendants to enter into a contract with the Fair Housing Council of Northern New Jersey to conduct the training (SA28-29, 45).

The Order also required defendants to engage an entity approved by the United States to conduct fair housing testing within 180 days of the Order (DA41-

42). Given defendants' failure to comply with other aspects of the Order,[7] the United States asked the court to modify the Consent Order to require defendants to engage the Fair Housing Council of Northern New Jersey to conduct the compliance testing (SA29, 45-46).

On the date of the hearing, defendants notified counsel for the United States that it wanted to engage attorney Terry Katay and the Fair Housing Institute of Norcross, Georgia (FHI), for these tasks (SA38 (training); SA48-49 (testing)). The United States objected to this proposal as Ms. Katay was "currently adverse to the Department [of Justice] on several cases" (SA45) and it believed that an out-of-state group would not have the resources necessary to conduct the compliance testing (SA45-46). Counsel for the United States also noted that the Department of Justice was not aware of any track record in testing for the Georgia group (SA52). Therefore, the United States urged the court to require defendants to engage the Fair Housing Council of Northern New Jersey to conduct the training and the tests (SA45-46, 50-51, 52). Defendants argued that they should be permitted to use Fair Housing Institute over the objection of the United States (SA42-44).

The court stated that it would impose a requirement of good faith on the right of the United States to withhold its acceptance of a group proposed by defendants to conduct the training and testing (SA46). It found that the United States met the requirement. It based that finding

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[7] The terms of the Order required defendants to enter into the compliance testing contract by March 23, 2002 (DA41-42).

> upon the representation that that organization is in litigation with the Department of Justice at the moment, coupled with the fact that the Fair Housing Council of [Northern] New Jersey is well known to the Court from other situations, other cases like this one, is perfectly capable of performing the limited function set forth in Roman numeral V at pages 9 and 10 of the consent order, and the fact that their testers had been involved at the outset of this situation, is not really all that significant.

SA46-47. The court noted that although the Fair Housing Council had always appeared on behalf of the government in cases before it,

> its testing I have found is objective. * * * I am comfortable with their objectivity.
>
> As to an institute which is run by an attorney who litigates against the Department of Justice, I, on the face of it, do not see such objectivity. So as to the testing * * *, I would approve the Fair Housing Council of Northern New Jersey and not the * * * Fair Housing Institute of Norcross, Georgia. And I would endorse the United States' similar position.
>
> And to carry it to its logical conclusion, I would endorse the right of the United States to refuse to agree to the Fair Housing Institute of Norcross, Georgia, for the reasons I have stated.

SA53. Later in the hearing, defendants' counsel acknowledged his acceptance of the court's decision by stating that "[t]he Fair Housing Council is going to test" (SA54).

On March 28, 2002, the court filed a written order setting forth its oral ruling at the March 11 hearing "to ensure Defendants * * * comply with the September 25, 2001, Consent Order entered by the Court" (DA60-61). The order, *inter alia,* required defendants, by April 1, 2002, to engage the Fair Housing Council of Northern New Jersey to conduct fair housing training and fair housing compliance

testing (DA62-63). To compel compliance with the Contempt Order, it also ordered that "[a]ny Defendant that is not in full compliance with the September 25, 2001 Consent Order or the provisions of this Order, shall be fined $1,000 per day for each day that the Defendant remains in violation of either the September 25, 2001 Consent Order or this Order" (DA63-64). Defendants did not appeal this Order.

4. *Defendants' Motion To Amend The Order Requiring Testing By The Fair Housing Council Of Northern New Jersey, And The United States Cross-Motion To Hold Defendants In Contempt And Impose Sanctions*

Defendants did not enter into a contract for the Fair Housing Council of Northern New Jersey to conduct the compliance testing by April 1, 2002. Instead, on August 28, 2002, defendants filed a motion to amend the first Contempt Order to permit them to use another entity to conduct the testing (DA65). Defendants claimed that the cost of testing by the Fair Housing Council would be "grossly excessive" and that there were "a number of other testing groups, privately owned, considerably less expensive and certainly just as reliable" (SA59). Defendants also contended that the Consent Order did not require use of the New Jersey group and that if this were the only group that the United States would approve, it should have been so designated in the Consent Order (*ibid.*).

The United States filed a response to defendants' motion that it combined with a cross-motion for contempt and sanctions (SA60-62). In its motion, the United States argued that defendants did not meet the standard that would permit the court to modify the Consent Order (SA64-67). Regarding defendants' desire to

have the court approve testing by an entity other than the Fair Housing Council of Northern New Jersey, the United States argued that defendants had presented no evidence to support their claim that the cost of compliance testing by that entity was "grossly excessive" or any greater than the cost of testing by any other entity (SA67-68, 69). In addition, the United States noted that nothing presented by defendants' motion contravened the court's March 11 findings on the credibility and independence of the Fair Housing Council of Northern New Jersey and the lack of objectivity of the Georgia entity proposed by defendants at the March 11 hearing (SA68-69).

The United States also moved the court for a second finding of contempt (SA70-73). The March 28 order required defendants to retain the Fair Housing Council of Northern New Jersey to conduct compliance testing by April 1. Despite efforts by the Fair Housing Council to enter into this contract (DA6), defendants had not complied with the order at the time they filed their motion nearly five months later. As a sanction, the United States sought imposition of the fine of $1,000 per day as specified in the court's first Contempt Order, commencing on April 1, 2002.

B. *Disposition Below*

On July 28, 2003, the court entered its order denying defendants' motion to amend and granting the United States' cross-motion for contempt and sanctions (DA3-19).

Addressing defendants' motion to amend, the court analyzed Supreme Court and circuit court law establishing the burden on a party that seeks to modify a consent order or contempt order (DA7-10). Applying the standard set forth in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), which requires an applicant to demonstrate that prospective application of the Consent Order creates a "grievous wrong in light of new and unforseen circumstances," the court held that "the fact that Defendants are required to pay an organization to conduct compliance testing is not a new and unforseen circumstance that would create a "grievous wrong" if the Consent Order were to be left unmodified" (DA11). Applying the more flexible standard of *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992), which requires a proposed modification to be based on "significant changes in facts or law" as well as to be "suitably tailored to the changed circumstances," the court held that "Defendants have not submitted any evidence, or provided any legal argument that there has been a 'significant change in facts or law' which would warrant modification of the Consent Order" (DA11).

> Defendants' request to unilaterally choose an organization to conduct compliance testing was previously rejected by the Court after oral argument * * *. The Contempt Order requires Defendants to enter into an agreement with FHC. Defendants failed to comply with this order. Therefore, Defendants' motion not only fails to meet either the *Swift* or *Rufo* standard for modification of a consent order, but it also has been addressed and rejected by this Court's prior order.

DA11-12.

The court then evaluated defendants' claims under the standards set forth by this Court in *Building & Construction Trades Council* v. *NLRB*, 64 F.3d 880, 888 (3d Cir. 1995), and concluded that:

> (1) both the Consent Order and the Contempt Order sought to prevent Defendants from violating the Fair Housing Act and continuing their discriminatory practices; (2) Defendants failed to comply with the terms of both the Consent Order and the Contempt Order by failing to engage FHC to conduct compliance testing by April 1, 2002; (3) Defendants made no efforts to comply with either the Consent Order or the Contempt Order in good faith; (4) Defendants are likely to continue to postpone compliance and thus avoid remedying their discriminatory conduct if the Consent Order is modified; and (5) Defendants have not shown any circumstances currently in existence that were either unforseen or not anticipated at the time the parties entered into the Consent Order. In fact, the record clearly indicates Defendants' bad faith in deliberately choosing not to comply with either the Consent Order or the Contempt Order. The Court is convinced that granting the requested modification would not only prolong Defendants' noncompliance, but would permit the rental of their apartment complexes to continue unmonitored and unremedied. Consequently, Defendants' motion to amend the Consent Order is denied.

DA12.

Turning to the United States' cross-motion for contempt and for sanctions, the court recognized its power to impose civil contempt sanctions against a party that fails to comply with a court order (DA13-14). The court noted that defendants were presented with the opportunity to execute a contract with the Fair Housing Council on April 3, 2002, two days after the deadline imposed by the first Contempt Order, but that they had refused to enter into the contract to the date of the court's order (DA16). The court outlined the efforts made by the Fair Housing Council and the United States to facilitate defendants' compliance with the court's

order by April 1 and defendants' "lack of cooperation" (DA6). The court noted that in a letter dated April 1, 2002, "Defendants' counsel confirmed * * * to FHC that he had notified Defendants of FHC's fees to conduct compliance testing and was awaiting their approval" (*ibid.*, citing DA73).

> FHC sent the compliance testing agreement to Defendants' counsel on April 4, 2002. [SA56.] On June 27, 2002, FHC sent another letter to Defendants' counsel again attaching the compliance testing agreement. [DA74.] When Defendants did not respond, FHC sent a letter on July 29, 2002, requesting that Defendants execute the compliance testing agreement within seven days. [SA57.] On July 30, 2002, Defendants sent a letter to FHC which stated that Defendants had decided not to use FHC because of their high fees and instead were looking to "at least" three other agencies who could conduct compliance testing. [DA75.] Consequently, on August 13, 2002, the United States sent a letter to Defendants' counsel indicating that Defendants' plan to engage a company other than FHC to conduct compliance testing without the approval of the United States, directly violated the terms of both the Consent Order and the Contempt Order. [DA76.] Two days later, Defendants' counsel notified the United States that it would petition the Court for leave to amend the Contempt Order requiring Defendants to engage FHC. [DA78.]

DA6-7.

Therefore, the court held that the United States met its heavy burden of showing by clear and convincing evidence that a court order existed, defendants had knowledge of the order, and defendants disobeyed the order (DA15-17). The court stated that

> Defendants' failure to engage FHC has been at its own peril. The consequences of Defendants' failure to engage FHC was plainly stated in the Contempt Order * * *. [M]onetary sanctions contemplated by the Contempt Order are necessary to reaffirm the authority of the court, to compensate the United States and ensure Defendant[']s compliance with the Court's Orders.
>
> DA17.

The court noted that the first Contempt Order contemplated a fine of $1,000 per day for every day defendants were in violation of the Consent Order or the Contempt Order and that defendants were presented with the opportunity to execute a contract with the Fair Housing Council on April 3, 2002, two days after the deadline imposed by the first Contempt Order, but that they had refused to enter into the contract (DA17). The court noted that, rather than executing the contract with FHC, defendants submitted their motion to amend that raised the same arguments addressed in the March 11 hearing, citing no legal argument to support their claims, and presenting no evidence to support their claims that the fees to be charged by FHC are grossly excessive or that other testing groups are considerably less expensive and certainly as reliable (DA17-18).

> As a result, monetary sanctions, as contemplated by the Contempt Order, shall be imposed on defendants for the period beginning April 3, 2002. However, because of the Court's delay in deciding this motion, the monetary sanction will be reduced. The period beginning on October 28, 2002 (60 days after the bad faith filing of the instant motion) and ending on August 15, 2003 will not be counted.

DA18. On August 29, 2003, defendants noted their appeal from sanctions imposed by this order (DA1-2).

STANDARD OF REVIEW

"The standard of our review of a district court sanction for civil contempt is whether the district court abused its wide discretion in fashioning a remedy." *Robin Woods Inc.* v. *Woods*, 28 F.3d 396, 399 (3d Cir. 1994), quoting *Delaware Valley Citizens' Council* v. *Pennsylvania*, 678 F.2d 470, 478 (3d Cir.), cert. denied, 459 U.S. 969 (1982).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in imposing a sanction of $1,000 per day for each day that defendants failed to comply with the Consent Order and the order finding defendants in contempt of the Consent Order that required defendants to contract with the Fair Housing Council of Northern New Jersey to conduct compliance testing. The district court's decision to require the defendants to contract with the Fair Housing Council, an order that defendants did not appeal, was fully justified given defendants' failure to fulfill their obligations under the Consent Order. The court gave clear notice to defendants that a failure to contract with the Fair Housing Counsel as ordered would be sanctioned by a fine of $1,000 per day. The district court's finding that defendants could have entered into the contract in April is supported by the evidence, and the court did not abuse its discretion in extending the fine for a period of 60 days after defendants filed their motion to amend.

The district court did not abuse its discretion in denying defendants' motion to amend, a motion that was not supported by any evidence justifying its arguments. Defendants knew that they would have to pay for the compliance testing when the court ordered them to enter into the contract with the Fair Housing Council, precluding a finding that the cost was a new and unforeseen circumstance. Defendants failed to submit any evidence of the cost of compliance testing by the Fair Housing Council or the other organizations contacted by defendants, thereby

precluding a finding that the Fair Housing Council's charges are "grossly excessive."

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A SANCTION OF $1,000 PER DAY FOR 208 DAYS FOR DEFENDANTS' FAILURE TO COMPLY WITH THE CONSENT ORDER AND THE COURT'S FIRST CONTEMPT ORDER

A district court possesses the inherent power to enforce compliance with its consent order and the inherent power to modify its consent order. *Holland* v. *New Jersey Dep't of Corrs.* 246 F.3d 267, 281-282 (3d Cir. 2001), citing *Spallone* v. *United States*, 493 U.S. 265, 276 (1990) ("[C]ourts have inherent power to enforce compliance with their lawful orders . . . .") (internal quotations and citation omitted), and *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244, 248-49 (1968) (a court can modify a consent decree "upon an appropriate showing" of "the specific facts and circumstances" in the particular case). A district court also has the power to impose a fine that is avoidable through obedience to coerce future compliance with a consent order. *International Union* v. *Bagwell*, 512 U.S. 821, 826-827 (1994).

When defendants failed to comply timely with *any* of the provisions of the Consent Order, see n.6, *supra*, the United States sought both enforcement and modification of the Order in the first motion for contempt filed February 14, 2002.[8]

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[8] Defendants assert that the United States filed its first motion for contempt "despite full knowledge that the Defendants-Appellants had executed a contract [to

(continued...)

Although by the March 11 hearing, defendants had complied with some provisions of the Consent Order, defendants had not yet entered into a contract with an entity approved by the United States to conduct the fair housing training of defendants and their agents and employees with responsibility for showing, renting, or managing dwelling units that should have been completed 78 days earlier.

Faced with defendants' disregard for obligations that they voluntarily incurred, the court found defendants in contempt of the Consent Order. To remedy this noncompliance, the court imposed two sanctions relevant to this appeal. First, upon the showing of the specific facts and circumstances regarding defendants' noncompliance, it modified the Consent Order to require defendants, by April 1, 2002, to enter into a contract with the Fair Housing Council of Northern New Jersey to conduct the fair housing compliance testing at defendants' apartment complexes required by Section VIII of the Consent Order (DA62-63).[9] Second, to

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[8](...continued)
conduct training] with FHI" (Br. 8). The United States filed its contempt motion on February 14, 2002, several weeks before defendants signed the FHI contract on March 4, 2002 (DA67), and did not learn that defendants wanted to use the Georgia group until March 11 (SA38). Furthermore, even had the contract been signed before the United States filed its motion and the United States had been aware of it, the contempt motion would have been justified, since the contract was with an entity not approved by the United States as required by the Consent Order (DA35).

[9] Defendants assert that the court's decision to order them to execute a contract with the FHC was "absent any reasoning for not allowing [the Fair Housing Institute of Norcross, Georgia] to proceed" (Br. 9-10). While the court's March 28 decision to require defendants to use FHC is not before this court on appeal, see *Harris* v. *City of Philadelphia*, 47 F.3d 1333, 1337 (3d Cir. 1995) (validity of an
(continued...)

coerce compliance with the Consent Order as modified, it imposed a sanction of $1,000 per day for every day after April 1 that defendants were not in full compliance with the Consent Order and the Contempt Order (DA63-64).

As set forth above, the modification of the Consent Order and the finding of contempt were well within the court's power. Defendants did not appeal the court's March 28 Contempt Order modifying the Consent Order and imposing the $1,000 per day sanction for future noncompliance, and these holdings became law of the case. *County of Suffolk* v. *Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (modification of consent order not challenged within period of time for appeal becomes law of the case); *Harris* v. *City of Philadelphia*, 47 F.3d at 1337 (validity of an order amending a consent order "is not open to collateral attack in a contempt proceeding for violating it"); *In re Grand Jury Proceedings*, 871 F.2d 156, 159 (1st Cir. 1989) (time to appeal the amount of a fine is when the daily rate is set).

Rather than enter into the contract with the Fair Housing Council of Northern New Jersey before the April 1 deadline as ordered by the court *and* as defendants' counsel stated at the hearing they would do (SA50, 54), defendants continued to disregard their obligation to conduct compliance testing at their apartment complexes. As the court found, defendants had the opportunity to enter

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[9](...continued)
order amending a consent order "is not open to collateral attack in a contempt proceeding for violating it"), the court's findings set forth *supra* at 12-13 fully support its decision.

into the compliance testing contract with the Fair Housing Council by April 3 (DA6, 16) and their failure to do so was "at their own peril" (DA17). The court then reduced the fine contemplated by the first Contempt Order, beginning the period of defendants' violation on April 3, 2002, two days after the date specified in the first Contempt Order, and ending the period on October 27, 2002, sixty days after defendants filed their motion to amend, "because of the Court's delay in deciding [the] motion" (DA18), and ordered defendants to pay $208,000 for their violation (DA19).

Defendants articulate a number of reasons that they claim warrant reversal. Their factual assertions are either not supported, or are contradicted, by the record and none of their arguments demonstrate that the "district court abused its wide discretion in fashioning a remedy." *Robin Woods Inc.* v. *Woods*, 28 F.3d at 399.

Defendants attempt to blame their failure to comply with the March 28 Order on the Fair Housing Council by claiming that the Council did not deliver a proposed testing contract until June 27, 2002, and claim to have "no * * * record" of the proposed contract (Br. 9, 18). Putting aside that the fact that there is no support in the record for this contention, it is clear that defendants learned the cost of testing by the Fair Housing Council no later than April 1, 2002 (DA73 (letter from defendants' counsel to the FHC stating "I have communicated the fees to my client and am awaiting approval")). Therefore, the court's finding that defendants could have entered into the testing contract by April 3 is well-founded.

Defendants' claims that the court gave them "no forewarning or indication" of the imposition of the monetary sanction (Br. 11) and that the sanction was "retroactive" (Br. 2,13) are without merit. A court gives clear warning that sanctions are possible when the court orders a party to do something by a date certain in the future or pay a sanction of $1,000 for each day thereafter it fails to do it, and there is nothing "retroactive" about then calculating the number of days the party failed to take the required action to determine the amount of the sanction.

Ignoring their own failure to take the actions necessary to retain an entity of their choosing to perform the fair housing compliance testing, defendants assert that they were "denied the ability to choose their own agency to perform said compliance testing" (Br. 17). Defendants did not appeal the court's decision to require use of the Fair Housing Council of Northern New Jersey; therefore, it is not before this Court for review. *Harris* v. *City of Philadelphia*, 47 F.3d at 1337.

Addressing this claim nonetheless, it is true, as defendants state (Br. 16), that the Consent Order itself did not require defendants to use the Fair Housing Council of Northern New Jersey to conduct the compliance testing. It is clear, however, that no one prevented defendants, beginning September 25, 2001 (or even before), from contacting the Fair Housing Institute of Norcross, Georgia, any of the other three entities defendants say they contacted in August 2002 (DA75), or any other entity about conducting the testing, then seeking the approval of the United States as required by the Consent Order. Instead, defendants did nothing to fulfill this requirement for more than five months.

On March 11, 2002, when the parties were before the court, the only options presented were the New Jersey group and the Georgia group. As discussed above, the court's ruling that it would not be appropriate to use the Georgia group was well-founded. Faced with defendants' failure to comply with this and other requirements of the Order, the court was well within its power to order defendants to use the Fair Housing Council of Northern New Jersey to conduct the testing. Defendants shirked their responsibilities under the Order and appropriately lost the right to choose the testing entity.

Defendants describe the 208-day period for which the court imposed the $1,000 per day penalty as "inexplicable" (Br. 12). On the contrary, this period is easily explainable. The court began the period on the first day after the deadline imposed by the March 28 order that it found defendants could reasonably have entered into a testing contract with the New Jersey group. It ended the period sixty days after defendants filed their motion to amend "because of the Court's delay in deciding [the] motion" (DA18). This is a total of 208 days.

Defendants complain that the court extended the period for which it imposed its sanction sixty days after they filed their motion to amend, and that any sanction for contempt should terminate as of the date they filed their motion (Br. 13,19). Absent a stay, defendants were required to comply promptly with the court's order to enter into a contract with the Fair Housing Council. *Harris* v. *City of Philadelphia*, 47 F.3d at 1337 ("[i]f a person to whom a judge directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must

comply promptly with the order pending appeal"), quoting *United States* v. *Stine*, 646 F.2d 839, 845 (3d Cir. 1981). Filing the motion to amend did not stay the order requiring defendants to enter into the contract. Therefore, this claim is without merit.

Defendants' arguments that the district court improperly denied their motion to amend the Contempt Order are similarly without merit. The district court articulated the substantial requirements that must be met to permit modification of the court's order (DA11-12). Defendants argued in their motion to amend that the Fair Housing Council charged "grossly excessive" fees for the testing (DA11). However, they failed to submit

> any evidence indicating what they consider to be a "reasonable" fee. Defendants also argue that other "testing groups" can be engaged which are "considerably less expensive and certainly as reliable." However, this claim is not accompanied by evidence which either reveals the names of these groups or the fees they charge to conduct compliance testing.

DA18.

Defendants argue to this Court that the Contempt Order was silent regarding the cost of compliance testing (Br. 16), and they "merely wanted to endure a less expensive testing firm for the required compliance testing" (Br. 18). The court correctly held that the cost of compliance testing "is not a new and unforeseen circumstance that would create a 'grievous wrong' if the Consent Order were to be left unmodified" (DA11). Defendants' failure to submit evidence supporting their argument to the district court precluded a finding by the district court that they had carried the burden of demonstrating changed circumstances warranting an

amendment to the order requiring the contract with the Fair Housing Council to conduct compliance testing, and precludes a finding by this Court that the district court abused its discretion in denying the motion to amend.

Defendants also argue that they filed their motion to amend in good faith (Br. 16). The district court found, however, that defendants' failure to submit any evidence to support their assertions in the motion to amend indicated "that Defendants' motion was not submitted in good faith and is merely an attempt to sanctify their non-compliance with the terms of the Consent Order and the Contempt Order" (DA18). On this record, the court's finding of bad faith can hardly be said to be clearly erroneous. Accordingly, the district court correctly concluded that defendants failed to meet the stringent requirements imposed on a party that seeks to modify a court's prior ruling.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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